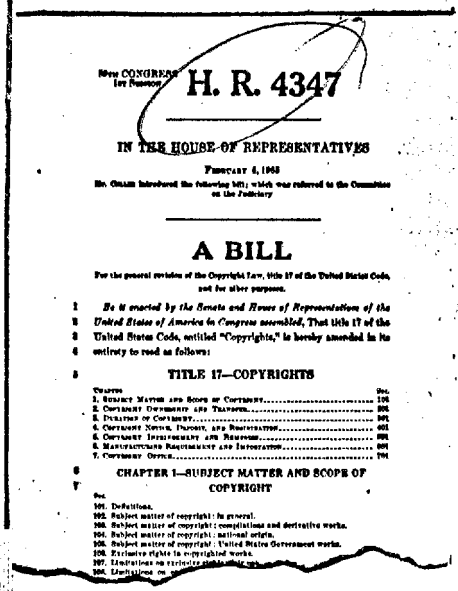
26 July 1965

HEARINGS REVEAL MAIN ISSUES IN COPYRIGHT REVISION

The tug-and-pull of Congressional hearings has revealed the major issues on which the success of copyright revision, embodied in H.R. 4347, depends



89TH CONGRESS
1ST SESSION

H. R. 4347

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 8, 1965

Mr. OMAR introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

For the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 17 of the United States Code, entitled "Copyrights," is hereby amended in its entirety to read as follows:

TITLE 17—COPYRIGHTS

Chapter — Sec.
1. Subject Matter and Scope of Copyright 101
2. Copyright Ownership and Transfer 201
3. Duration of Copyright 301
4. Copyright Notice, Deposit, and Registration 401
5. Copyright Infringement and Remedies 501
6. Manufacturing Requirements and Importation 601
7. Copyright Office 701

CHAPTER 1—SUBJECT MATTER AND SCOPE OF COPYRIGHT

Sec.
101. Definitions.
102. Subject matter of copyright: In general.
103. Subject matter of copyright: compilations and derivative works.
104. Subject matter of copyright: national origin.
105. Subject matter of copyright: United States Government works.
106. Exclusive rights in copyrighted works.
107. Limitations on exclusive rights: fair use.
108. Limitations on exclusive rights: [illegible]

SUBCOMMITTEE Number Three of the House Judiciary Committee has completed six weeks of hearings—mostly, two hearings per week—on the copyright revision bill, H.R. 4347. Rep. Robert W. Kastenmeier (D., Wisconsin) has served as acting chairman of the subcommittee, and a majority of the subcommittee has been present at most of the sessions.

Hearings have now been suspended temporarily and will not be resumed until late July at the earliest. Still to come is testimony from book manufacturers and printing trade unions on the manufacturing clause, from broadcasters and from various bar associations, including the American Patent Law Association. The American Bar Association, which has already testified in opposition to the juke box exemption, will consider the revision bill as a whole at its annual convention in Miami Beach during the second week of August.

What is in the subcommittee's record now is testimony on the "big" issues—the issues on which the success of copyright revision depends. There appear to be six of these: term of copyright; education and the question of "fair use"; the manufacturing clause; the status of juke boxes; community-antenna television; and the compulsory license rate for phonograph records.

1. *Term of copyright.* Section 302 of the bill sets the term of copyright (with certain exceptions) as the life of the author and 50 years after his death (thus replacing the present system of a term of 28 years plus a renewal term of another 28 years). In testimony before the subcommittee, the life-plus-50-years concept has been vigorously supported by the representatives of creators of copyright materials, including publishers. It has been attacked by representatives of users of copyright materials, including educators, magazine publishers and librarians.

Opponents of life-plus-50 have said that a renewal system is in the public interest, since at present 85% of copyrighted material is not renewed for a second term. (In rebuttal, it has been said that most of this 85% consists of material that was ephemeral even at the time it was first copyrighted.) These opponents have argued that under a life-plus-50 system, there would be uncertainty regarding the status of some copyrighted works, resulting from uncertainty as to when the author died.

Supporters of life-plus-50 have cited a number of advantages that would accrue from changing over to that system. Life-plus-50, they have said, would offer greater ease of access since there would be only one copyright date, not—as can happen under the present system—several, covering various parts of the work. Since the bill contemplates the establishment of a single system of copyright law (*i.e.*, no more common law copyright for unpublished works), it is easier to determine term of copyright with life-plus-50, its supporters have said, than it would be, with unpublished material, to determine when the act of *creation* took

place. Life-plus-50 could pave the way for eventual American entry into the Berne Convention. In any event, supporters of life-plus-50 have said, it will be 50 years before life-plus-50 copyrights run out, ample time to prepare for whatever technical difficulties might develop in tracing copyrights.

Section 302—the term of copyright — clearly is the core of the copyright revision bill.

2. *Education and the question of "fair use."* Section 107 of the bill says, " . . . the fair use of a copyrighted work is not an infringement of copyright." Thus the bill's position—one which publishing groups have supported —is to leave the determination of "fair use" where it is now: with the courts. This represents something of a retreat from the Register of Copyrights' earlier revision bill, introduced in the last session of Congress but not acted upon, which attempted to spell out some definitions of what was and what was not "fair use."

This approach of leaving "fair use" to judicial determination has been attacked by educators, who want spelled-out exemptions from infringement liability as far as nonprofit educational uses (including educational television) of copyrighted materials are concerned. The spearhead of the educators' attack has been the so-called Ad Hoc Committee (of Educational Institutions and Organizations) on Copyright Law Revision. Testifying for the Ad Hoc Committee on June 2, Harold E. Wigren, representing the National Education Association, said:

"We commend the Register of Copyrights for proposing in H.R. 4347 that 'fair use' be made statutory in Section 107. We feel, however, that statutory 'fair use' is not enough for education to do its job. 'Fair use' is not a sufficient guideline to the classroom teacher to know when copyrighted materials may or may not be used. Under the present law, we have 'fair use' judicially interpreted and the 'for profit' limitation. Under H.R. 4347, we have statutory 'fair use' merely mentioned and no 'for profit' limitation. Substituted for the 'for profit' limitation is a most inadequate and limited Section 109 which gives categorical exemptions rather than a uniform general one. We feel, too, that the statutory 'fair use' Section 107 is narrowly written and needs to include the words 'teaching, scholarship, research' as they appeared in the Register's July 20, 1964, draft.

"The single most important objection which the Ad Hoc Committee has to H.R. 4347 is the fact that no mention is made of statutory limited copying privileges so urgently needed by teachers in the course of their day-to-day teaching. This omission will seriously handicap boys and girls in classrooms throughout the nation and deprive them of the best teaching practices available. . . .

"We commend the Register for including in Section 109(2) of H.R. 4347 the concept that educational television should be treated as a normal part of education. We regret, however, that the new bill limits the exemption on the uses of copyrighted materials in educational television to instructional telecasts beamed primarily for reception in the classrooms or similar places normally devoted to instruction. We deplore the emphasis on the 'place' of reception because this ignores the great potentiality of instructional television in reaching adults and children in their homes with programs for the illiterate adult, for the culturally disadvantaged, for those in need of job retraining and for pre-school children. This would defeat one of the purposes of the Economic Opportunity Act and the Elementary and Secondary Education Act of 1965."

A diametrically opposed view of education and "fair use" was presented to the subcommittee by Lee C. Deighton, chairman of Macmillan, who testified on behalf of the American Textbook Publishers Institute. "It seems clear to me," Mr. Deighton said, "that Section 106 sets forth in detail the rights that I had supposed copyright owners to have. But in the following sections, the word *exemptions* appears, and it appears for the first time to my knowledge in any copyright legislation. The textbook publishers have looked carefully at these exemptions. We are dismayed to discover in Sections 108, 109, 110, and in the applicable definitions in Sections 101 and 106, provisions which appear to undermine the very foundations of educational publishing.

"With the help of our lawyers, the educational publishers have learned to parse the language of these sections. We noted, for example, that the word *transmit* appears in these sections. 'To transmit' is defined . . . as follows: 'To transmit a performance or exhibition is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.'

"This definition would encompass not only radio, telephonic and television broadcasting but any other transmission of educational materials orally or visually from one place to

another. This, of course, is the way in which information retrieval systems operate. The application of this definition to Sections 109 and 110 would permit free use of educational materials. We cannot believe that this was the intent in the draft of these sections. This seems to us to be a matter of language, and we ask for clarification.

"Educational publishers are particularly concerned with Section 109. We understand and we concur that a teacher ought to be able to hold up a map before a class without worrying about copyright law. We understand that teachers and pupils ought to be able to read aloud from copyrighted materials. . . . These uses are permitted under the present law. The proposed bill not only continues these rights but appears to go much farther. It appears to provide free use by educational institutions of copyrighted material not only in the commonsense, traditional manner but by the use of machines. The end result of this free use would be to displace the educational materials we publish and ultimately to destroy our market. . . .

"When the definitions of 'to exhibit' and 'to perform' are read into the exemptions of Sections 108 and 109, educational publishers are shocked. For here they learn that there is proposed language in a copyright law that would permit such many and varied free uses of copyrighted material as to threaten the very market for these materials. . . . By *threaten,* I do not mean that our profits would be reduced; I mean that the publication of instructional materials would no longer be economically feasible."

Mr. Deighton endorsed the Section 107 statement on "fair use," leaving definition to the courts "where it has rested since 1790. As a practical matter," he said, " 'fair use' can be determined only by consideration of the facts of the use. No effort to spell out 'fair use' by statute can cover all situations. We respectfully suggest that language added to Section 107 in an effort to clarify 'fair use' would not succeed. It would raise a whole new set of undecided questions for courts to settle and would lead of necessity to costly litigation. Until such questions were settled in the highest court, no one would know precisely what is 'fair use' and what is not.

"Further, the great virtue of the 'fair use' doctrine is its flexibility, permitting ready application to novel situations as they arise. Any detailed expansion by statutory language would introduce elements of rigidity, inappropriate in a fast-changing society. . . .

"Educational institutions and organizations are our market. We cannot sell our materials anywhere else. If these institutions and organizations are exempted from the application of copyright, there is no market, and we can no longer function as part of the educational enterprise. At this moment, more than 70 million Americans are engaged in instruction in one form or another with educational institutions and organizations. To exempt so large a group from the applications of copyright would be fatal to the publication of instructional materials by private industry. We respectfully urge that 'fair use' not be confused with 'free use.' "

3. *The manufacturing clause.* Section 601 of the copyright revision bill is the manufacturing clause, which, though somewhat modified from the existing law, makes U.S. manufacture a condition of copyright for works of U.S. authorship. As noted above, debate before the subcommittee has not yet been completed, since the book manufacturers and the printing trades unions are still to be heard. So far, witnesses from publishing have attacked the manufacturing clause but have deferred detailed discussion of the issue until the end of the hearings, when a day is to be devoted to the subject. Mr. Deighton called the manufacturing clause "an outright tariff provision that has no place in a copyright law." Dan Lacy, managing director of the American Book Publishers Council, expressed the conviction that "in principle, protective legislation of this sort does not really belong in the copyright law. . . . The author's rights to his own work ought not to be subordinated to the other economic interests here concerned."

Mark Carroll of Harvard University Press, testifying for the Association of American University Presses, stated that the manufacturing clause "should be eliminated entirely. . . . The Association of American University Presses speaks with special vehemence on the manufacturing clause," Mr. Carroll said, "because its member presses publish the works of many scholars that require complex composition, as in mathematics and foreign languages, in which foreign manufacture does on occasion provide significant economies. Sometimes such economies make the difference between publication and non-publication. Publications of this character do not bulk large in the total volume of the printing trade, yet they make a significant contribution to the diffusion of knowledge. In arguing against the manufacturing clause, we feel that we are

arguing for the scholar as well as the scholarly publisher. But above all, we are opposed to the manufacturing clause because, in the field of authorship, it qualifies without just cause a right of property that should be held sacred."

Both Mr. Lacy and Mr. Deighton indicated in their testimony that publishers are continuing discussions with the Book Manufacturers' Institute in the hope of developing a compromise manufacturing clause that will be acceptable to all parties concerned. In subsequent interviews, both have expressed optimism about the possibility of such a compromise. The shape of an acceptable-to-all manufacturing clause, however, remains to be seen.

4. *The status of juke boxes.* Section 114 of the bill states: "The proprietor of an establishment in which a copyrighted non-dramatic musical work is performed publicly by means of a coin-operated machine is not an infringer unless alone or jointly with others he owns the machine or has power to exercise primary control over it; or he refuses or fails, promptly after receipt by registered or certified mail of a request by the copyright owner, to make full disclosure of the identity of the person who owns the machine or has power to exercise primary control over it." This section has the effect of ending the present exemption of juke box operators from the payment of performance royalties. Naturally, this change is being opposed by manufacturers of juke boxes and, also naturally, is being supported by composers' groups.

5. *Community-antenna television.* Under Section 109(7) of the bill, "communication of a transmission embodying a performance or exhibition of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes" is not an infringement "unless a direct charge is made to see or hear the transmissions or the transmission thus received is further transmitted to the public." This section would make the burgeoning field of community-antenna television (CATV)—signal-boosting subscription services in communities where unassisted TV reception is poor—liable for payment of royalties to broadcasters and other proprietors of copyrighted material thus transmitted. CATV promoters, naturally, are against Section 109(7), and broadcasters and other groups are for it.

6. *Compulsory license rate for phonograph records.* Section 113 of the bill reaffirms the principle in the current law that once a musical composition has been recorded, anyone else may record the composition upon securing a compulsory license and paying royalties at the compulsory license rate. Since 1909, this rate has been 2 cents per composition. The new bill would raise the rate to "either three cents or one cent per minute of playing time or fraction thereof, whichever amount is larger." The record industry has opposed this increase in the rate.

IN ADDITION to these major controversies, numerous smaller issues have been aired in the course of six weeks of hearings, the result of which is impossible to determine at this time.

The hearings got off to a strong start during the first week, with the witnesses virtually unanimous in supporting the bill, not only in general but in most details — a fact which clearly impressed the subcommittee members. The Authors League was represented by a panel composed of Rex Stout, Elizabeth Janeway, John Hersey, Herman Wouk and, as counsel, Irwin Karp. They presented arguments in favor of a life-plus-50 term, compensation for educational use of copyright materials, judicial determination of "fair use," abolition of the manufacturing clause, an end to the juke box exemption, an increase in the compulsory license rate for phonograph records and the bill's provision for a 35-year limitation on copyright assignments.

Book publishing witnesses heard during the first week were former Senator Kenneth B. Keating, representing ten textbook companies; Dan Lacy and Horace Manges, counsel for the ABPC; and Lee Deighton for the ATPI.

Mr. Keating, after a general statement on the importance of copyright as an incentive to creativity, turned to the issue of photocopying.

"On a short-term basis," he maintained, "it might appear that the simplest and most practical response would be to provide that photocopying of copyrighted works should not be impeded by requiring any kind of license from the copyright owner or payment to him and that our storage and retrieval systems should likewise be exempted from the financial burden of having to deal with authors and publishers. Of course, this

would make immediately available to everybody, without effort, without cost, everything that the publishers have published and writers have written. The inexorable question arises: What will happen in the long run if authors' income is cut down and down by increasing free uses by photocopy and information storage and retrieval? Will the authors continue writing? Will the publishers continue publishing if their markets are diluted, eroded and if, eventually, the profit motive and incentive are completely destroyed? To pose this question is to answer it."

Lee Deighton prefaced his remarks on the relationship between education and educational publishing (quoted above) with a lucid exposition of the nature of the textbook industry, with emphasis on the investment of money and time involved in the creation of educational materials.

Mr. Lacy testified about the manufacturing clause (quoted above), education and "fair use" (testimony which generally paralleled Mr. Deighton's) and on the copyright status in federal government publications. Mr. Lacy took issue with the theory that copyrighting a work by a government employee, performed within the scope of his official duties, was the same as "giving away" public property. To copyright such a work, Mr. Lacy said, "asserts and defines the public's ownership of that property and permits the government to exact a full and just payment of royalties from any private publisher who issues it, so that the taxpayers can be reimbursed in whole or in part for their investment. It seems to us that the objects of public policy in this area should be three: to encourage responsible public officials to write in the areas of their responsibility; to obtain the widest and freest public dissemination of scientific, technical, medical, economic, political and other information developed within the government; and to prevent any unjust exploitation of public property for private profit. Within carefully drawn statutory guidelines, and adhering normally to the general principle that government publications are not copyrighted, we believe that government agencies should be able to make exceptions to this principle and to obtain copyright in a work done by an employee as part of his duties, when such action is necessary to achieve the objects of public policy set forth above."

Mr. Manges' testimony was a section-by-section analysis of the language of the bill together with suggestions to clarify the language and to represent more adequately the realities of book publishing.

The second week of hearings was dominated by educators and librarians. The educators' stand was crystallized in the testimony by the Ad Hoc Committee (quoted above), though there is not complete unanimity among the organizations represented in the Ad Hoc Committee. (Rather, it was described as a "consensus" position.) The president of the National Education Association fully endorsed the Ad Hoc Committee's position, a development that was not entirely expected.

Rutherford D. Rogers, for the Joint Libraries Committee on Fair Use in Photocopying, and Charles F. Gosnell, for the American Library Association, generally supported the bill and agreed that from their point of view, it was best not to include in the statute any specific provisions on copying. Mr. Rogers supported judicial determination of "fair use" and opposed the Ad Hoc Committee's request to define "fair use" in the statute. Mr. Gosnell asked for a fixed term of copyright, rather than life-plus-50.

Educational broadcasters, in testimony, emphasized the educational function of educational broadcasting, in contrast to the more limited instructional function sanctioned in the bill. They argued that because theirs were non-profit stations, they should be exempted from payment of performance royalties. Donald R. Quayle, appearing for the Eastern Educational Network, said that the bill's limitation on ETV to the making of a single video tape would hamper program exchanges among stations—which, he said, is needed to strengthen ETV.

UNIVERSITY PRESSES TESTIFY

The third, fourth and fifth weeks of the hearings were devoted largely to matters involving music, records, juke boxes and motion pictures.

It was during the fifth week, however, that Mark Carroll testified for the AAUP. Mr. Carroll strongly opposed the manufacturing clause (as reported above), advocated judicial determination of "fair use" and took a stand on the desirability of copyright in government publications that was somewhat stronger than Dan Lacy's stand on the same subject.

"The federal government" Mr. Carroll said, "is already the major sponsor of research in the natural sciences, and it may well have the same position in the near future in

the social sciences and the humanities. A copyright law that does not recognize federal involvement and participation in research and publication, in every area of knowledge, and that does not have some provision to protect the rights of authors employed by the federal government by permitting copyright of government publications under special and controlled conditions will be fair neither to authors nor to society's need for the widest dissemination of useful knowledge.

"From the point of view of the scholar-author, a lack of provision for copyright protection of government publications would put a penalty upon his taking employment with the government, rather than with a university, a research institute or a private enterprise. From the point of view of the general interest in the dissemination of knowledge, prohibition of copyright in governmental publications places a handicap on the operations of publishers, whether they are non-profit or commercial. Experience has shown that the government itself is an ineffective publisher: it can release a book or a pamphlet, but it cannot advertise, sell and promote it. Non-governmental professional publishing organizations, commercial or non-profit, are the most effective agencies for achieving publication. They can do so only with the protection for their publishing operations that copyright provides.

"In the Association of American University Presses, we are thinking primarily of works of scholarship written by government employees in line with or as a by-product of their official duties, that make recognizable contributions to their fields of study. Their authors should enjoy copyright protection for their contributions to scholarship equivalent to that of their fellow scholars outside the federal government. They can do so only if they—and their publishers—can be assured copyright protection under controlled conditions."

The last witness heard so far from the book trade was Bella Linden, copyright counsel for the ATPI, who testified during the sixth week of hearings. Mrs. Linden's testimony covered two major points: the threat presented to copyright holders, now and in future, by computerized systems of data storage and retrieval; and the similar threat posed by unrestrained photocopying. Mrs. Linden described an ASCAP type of licensing operation for educational and research copying of copyrighted materials. "I have been authorized by the American Textbook Publishers Institute," she told the subcommittee, "to describe a blanket licensing system for copyrighted materials which would satisfy this year's needs as well as the future needs of educators and researchers for unimpeded access to copyright material.

"ATPI proposes to set up a clearing house for the reference and instructional materials published by its member firms. Their materials will be available to information retrieval systems now found chiefly in government and industry but soon to be installed in networks of college libraries and in our public schools. The materials published by ATPI members will also be available for photocopying whereever located. The proposed clearing house would be open to all users of copyrighted instructional materials. Our immediate present concern is with teachers at all levels of instruction."

In other points, Mrs. Linden emphasized that this proposed ATPI clearing house is still in the planning stage; that since the copying license would be a blanket fee, continuous sampling of copying activities would be necessary; and that for at least the first five years of the program, all income derived would be devoted to sampling studies. With this proposal as background, Mrs. Linden endorsed the bill's concept of leaving the determination of "fair use" to the judiciary. "The doctrine of 'fair use' was never intended to afford certainty of the law," she said. "On the contrary, the whole purpose and philosophy behind a doctrine such as 'fair use' is to give elasticity to what otherwise might be rigid statutory language."

THE LEGISLATIVE RECORD

With the hearings now suspended, the natural question arises: What happens next? It appears likely that once the hearings are completed, the subcommittee will ask the Copyright Office to submit alternative language on certain sections of the bill—perhaps on all or some of the six main points outlined above, perhaps on other points as well. Just as important as the specific language of the copyright act that finally emerges from the Congressional cauldron is the matter of what such language is supposed to mean. This question of *intent* is what is being hashed out now before Subcommittee Number Three of the House Judiciary Committee. Through the legislative record now unfolding a generation of jurists yet unborn is being offered guidance.